

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	4:99CR3040
	)	
v.	)	
	)	
MICHAEL A. EALEY,	)	MEMORANDUM AND ORDER
	)	
Defendant.	)	
_____	)	

Michael A. Ealey (Ealey) wants me to appoint counsel for him so he can challenge his conviction under the recently decided opinion of the Supreme Court styled, *Johnson v. United States*, 135 S.Ct. 2551 (June 26, 2015) (the “residual clause” of the Armed Career Criminal Act—“any felony that “involves conduct that presents a serious potential risk of physical injury to another”—violated the Due Process Clause). I will deny his motion.

First, the burglary<sup>1</sup> he was convicted of committing and that partially resulted in Ealey being held to be a “career offender” under the Guidelines is an enumerated offense under, but not part of the residual clause of, U.S.S.G. § 4B1.2(a)(2).

Second, the attempted robbery<sup>2</sup> that partially resulted in Ealey being a “career offender” has an element involving the use, attempted use, or threatened use of physical force against the person of another. U.S.S.G. § 4B1.2(a)(1). Under Nebraska law, an individual attempts to perpetrate a robbery when he forcibly by violence or by putting in fear attempts to take from another or from his immediate possession or

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<sup>1</sup>Filing no. [46 at CM/ECF p. 7](#) ¶ 35 (Revised Presentence Report).

<sup>2</sup>*Id.* at CM/ECF p. 8 ¶ 39.

custody any money or personal property of value with intent to rob or steal. *See, e.g., Wilson v. State*, 204 N.W.2d 258, 266 (1960).

In short, *Johnson* does not apply in this case assuming for the sake of argument that it is retroactive. Ealey was not sentenced under the “residual clause.” Consequently, he is not entitled to the appointment of counsel.

IT IS ORDERED that the Motion for Appointment of Counsel (filing no. [149](#)) is denied.

DATED this 2<sup>nd</sup> day of September, 2015.

BY THE COURT:

*Richard G. Kopf*  
Senior United States District Judge